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Supreme Court of the United States

October Term, 1942

Docket No. 511

JOHN F. NOBLE, doing business as NOBLE TRANSIT COMPANY,
Appellant,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Appellees.

APPELLANT'S BRIEF.

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Dated this Fourth Day of March, 1943.

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Appellees.

APPELLANT'S BRIEF.

GROUNDS ON WHICH JURISDICTION OF COURT IS INVOKED.

A. The statutory jurisdiction of the Supreme Court to review by direct appeal the final decree complained of is conferred by:

Section 5 of the Commerce Court Act (c. 309, 36 Stat. 539; U. S. Code, Suppl. 111, Tit. 28, Sec. 45a).

Section 238 of the Judicial Code as amended by the Act

of February 13, 1925 (c. 229, 43 Stat. 936, 938, par. (d); U. S. Code, Tit. 28, Sec. 345).

Urgent deficiencies Act of October 22, 1913 (c. 32, 38, Stat. 210, 219; U. S. Code, Tit. 28, Sec. 45 and 47a, Suppl. III).

B. The final decree sought to be reviewed was entered July 22, 1942. The petition for appeal was filed and the Order allowing the appeal was entered August 10, 1942 (R., 349-350).

C. Appellant, a contract carried by motor vehicle, subject to the Motor Carrier Act of 1935, and Amendments thereto, and to the jurisdiction of the Interstate Commerce Commission thereunder, sought, by timely application to the commission for a permit, (MC-70830), to continue his "grandfather" operation under the right granted him by the "grandfather" clause of said Act. His application was in the alternative, either to operate as a contract carrier or as a common carrier, or for just cause shown, to operate in both capacities. The Commission, on May 13, 1941, made its order on said application, effective August 15, 1942, partially denying appellant's "grandfather" rights and materially restricting his bona fide "grandfather" operation, not only as to commodities and territory but more specifically to certain shippers or types of shippers, all of which appellant contends was an arbitrary restriction and an abuse of the authority and power granted the Commission and was contrary to the intent of Congress and the clear provisions of the Motor Carrier Act.

After said denial by the Commission, the appellant filed a suit in the United States District Court for the District of Minnesota on the 8th day of November, 1941, pursuant to 28 U. S. C. 41 (28), 43-48, 49 U. S. C. 305 (g), praying

that the Court suspend, annul, set aside and enjoin the Commission's Order on the grounds set forth in the Statement as to Jurisdiction on file in this appeal in this Court, and which grounds substantially appear in the Subject Index and Points of Fact and Law set forth in this Brief.

The answers of the United States of America and the Interstate Commerce Commission denied the material allegations of the complaint (R., 27-30).

Final hearing was held before the statutory court of three judges on the 30th and 31st days of March, 1942, and Findings of Fact, Conclusions of Law, and Final Decree were filed on the 22nd day of July, 1942, holding the Commission's Order valid, dismissing plaintiff's complaint, and denying to plaintiff the relief sought (R., 348-350). An appeal was thereupon, on August 10, 1942, taken to the Supreme Court of the United States.

D. The questions presented are substantial and of public importance.

E. The following are some of the cases that sustain the jurisdiction of the Supreme Court to review the decree of the District Court;

U. S. v. N. E. Rosenbloom, Vol. 62, No. 6, Sup. Ct. Rep., Page 445;

U. S. v. Carolina Freight Carriers Corporation, Vol. 62, No. 9, Sup. Ct. Rep., Page 722;

Howard Hall Company, Inc. v. U. S., Vol. 62, No. 9, Sup. Ct. Rep., Page 732;

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STATEMENT OF THE CASE.

This is a statutory appeal from the decision and order of the District Court of the United States for the District of Minnesota, Third Division, dismissing appellant's petition for an order to suspend, annul, set aside and enjoin an order of the Interstate Commerce Commission, issued on May 13, 1941 (28 MCC 653), denying in part appellant's authority he sought, by timely application to the Commission, to continue his bona fide "grandfather" operation as provided for in Section 209 (a) and (b) of the Motor Carrier Act of 1935, as amended in 1940 by what is now known as the Interstate Commerce Act, Part II and certain applicable provisions of Part I. The lower Court held the order of the Commission valid and ordered the petition of appellant dismissed. Appellant's appeal to this Court is taken from that decision and order of the lower Court pursuant to law as set forth in the grounds on which jurisdiction of this Court is invoked.

On July 1, 1935, the crucial date for "grandfather" operations, and for some time prior thereto and continuously thereafter, the appellant was in the business of a general contract carrier by motor vehicle and was also in the business of an irregular carrier of general commodities in a certain designated territory. He was not a private carrier for any one shipper, or a transfer agency for common carriers, but was serving the public. He built up and owned his business and equipment. He operated at a profit in this service, was financially able to carry on his operation and

held permits or certificates from those states within his territory that required them.

He filed a timely application with the Commission under Section 209 (a) and (b) of the Motor Carrier Act for a permit to continue his operation. His application was in alternative form, either for permit as a general contract carrier by motor vehicle or a certificate as a common carrier of general commodities (with exceptions), or both in the discretion of the Commission for good cause shown as provided in Section 210 of the Act. That application was based upon appellant's status on July 1, 1935, as both a contract carrier and a common carrier, which status was acquired and under which he carried on his operation as follows:

Appellant started in the transfer and transportation business as a general contract carrier by motor vehicle in 1934, holding himself out to the general public as such, and he also operated as an irregular carrier of general commodities (with exceptions), holding himself out also to the general public as such, and having obtained a permit from the State of Wisconsin for movements of general commodities between Chicago, Milwaukee and the Twin Cities area. He actively solicited business from whomsoever he could get it in both of his carrier operations. In November, 1934, in his status as a general contract carrier, he entered into a contract with Swift & Company for the carriage of merchandise for that company and its subsidiaries in the trade territory of its South St. Paul plant which required him to operate *between* points in Minnesota, Wisconsin, Iowa, Illinois and North Dakota. Proper licenses and permits were issued by the various states for these operations. A similar contract was made by the appellant in February, 1935, with

Libby, McNeil & Libby, and under his common carrier permit, he transported general commodities. The appellant, on June 1, 1935, made a contract with the Kraft Cheese Company for transportation of its products generally westward from Green Bay and Plymouth, Wisconsin, and northward from Chicago and Freeport, Illinois. Subsequently to the dates mentioned, the appellant claims to have made approximately 120 contracts with shippers for the transportation of property, more than 80 of which are still in existence. He has in operation 22 tractors, 22 trailers and 7 trucks. He has about 80 employees, and has warehouse and terminal facilities in Minnesota, Wisconsin, Illinois and Iowa. *All these facts of appellant's bona fide "grandfather" operation are definitely stated in the Lower Court's Primary Findings* (R. 333, 334).

Appellant was the first operator to establish relay runs between the Twin Cities and Chicago, has transported in the past few years, and is transporting, approximately 100 million pounds a year within his "grandfather" territory. All of appellant's contracts with shippers obligated him to transport similar commodities, property or manufactured products as were included in the wide range of commodities, property or products which he contracted to transport and did transport, in his "grandfather" period, for Swift & Company, Libby, McNeill & Libby, Kraft Cheese Company and their subsidiaries and affiliates, and other shippers; and were transported within the same territory covered by those major shippers. They were clearly within the scope of his general contract carrier status, and his status as an irregular carrier of general commodities. He has, at large expense and diligent efforts, increased his equipment, facilities and personnel for successful, efficient

and expenditious operation. All these operations have been *continuous* operations for close to eight (8) years (R. 23—Findings) conducted in good faith and with full knowledge and sanction of the Commission. All additions and substitutions in appellant's contracts, and operations thereunder since July 1, 1935, were, predicated upon the proviso of Section 209 (b) which provides:

> "No terms, conditions, or limitations shall restrict the right of the carrier to substitute or add contracts within the scope of the permit, or to add to his or its equipment and facilities, within the scope of the permit, as the development of the business and the demands of the public may require."

All these operations constitute and did constitute the "business of the carrier and the scope thereof".

Moreover, the appellant was a member of and registered under the N. R. A. and the Code of Fair Competition for the trucking industry prior to July 1, 1935, which registration, under Section 209 (a), is held as evidence of his bona fide "grandfather" operation.

The form of application prepared by the Interstate Commerce Commission for "grandfather" permits or certificates required the applicant to state his *main* or *principal* operation and appellant did state on his said application his main or principal operation to be that for Swift & Company, Libby McNeill & Libby and Plankinton Packing Company, Milwaukee, Wisconsin, *and others*, within his "grandfather" territory, setting forth that the products he transported consisted of *commodities generally, meats and packing house products specially.* The application asked for merely typical things in quite a general way. The Trial Examiner

conceded that applicant was not restricted by his application (R. 34).

The Commission, in its Findings, admitted, and the exhibits in evidence show, that the appellant, within the "grandfather" period, transported *a wide range of commodities* (R. 22), including many food products other than canned goods, dairy products, fresh meats and packing house products and supplies, not only over the irregular routes *between* points and places in his territory, but over regular routes between Chicago, Illinois and the Twin Cities area (R. 21). He was as stated, actively soliciting during his "grandfather" period whatever kind of product he could get at any of the points and places in his territorial operation. After the crucial "grandfather" date, he made additions to his contract in line with his "grandfather" operation.

The Commission, however, in its Findings and Order, and the lower Court in its affirmance of that Order, erroneously and arbitrarily restricted the appellant's bona fide "grandfather" operation not only to certain types of commodities which appellant had transported, and to a much more circumscribed territory than his operation encompassed, but also restricted his general contract carrier *business* and the *scope* thereof to certain shippers or types or classes of shippers. In fact, the Commission made a further more drastic, arbitrary and unwarranted restriction by classifying the comprehensive business of those shippers, who are general manufacturing and food products concerns, within the very narrow limits of a major product in which the shippers deal or some special branch of their business, holding:

"*Findings:* We find that on July 1, 1935, and continuously since, applicant has been in bona fide operation as a contract carrier by motor vehicle in interstate or foreign commerce under individual contracts with persons (as defined in Section 203 (a) (1) of the act) who operate *food canneries* or *meat-packing businesses*, (a) of canned foods, *from* Blue Island, Illinois, *to* St. Paul, South St. Paul, Minneapolis and Minnesota Transfer, Minn., and (b) of fresh meats, canned foods, dairy products, and packing house products and supplies *from* South St. Paul *to* Grand Forks, N. Dak., Chicago and Rockford, Ill., and points in that portion of Wisconsin on and east of the Mississippi River *from* the intersection of the Wisconsin-Illinois-Iowa State lines near Dubuque, Iowa, *to* LaCrosse, Wis., and U. S. Highway 53 *from* LaCrosse to Cameron, Wis., and on and south of U. S. Highway 8, and (c) of the *commodities described in (b) from* Chicago *to* St. Paul, Minneapolis, South St. Paul, Winona, and Rochester, Minn., and LaCrosse, Wis.; over *irregular* routes; that applicant is entitled to a permit authorizing the continuance of such operations; and that in all other respects the application should be denied" (R. 23). (Italics ours.)

The Commission, in appellant's case, in the face of its own Findings that appellant had transported a wide range of commodities, manufactured products and especially foods, other than canned foods, fresh meats, dairy products and packing house products and supplies (R. 21), applied to appellant's case the arbitrarily restrictive policy and unwarranted interpretation of the Motor Carrier Act it had adopted in the *Keystone Transportation Contract Carrier Case*, 19 MCC, 476, 1 Federal Carrier Cases 374, 389, stating:

"The question of the form of authority to be granted to contract carriers of retail food store *commodities* was considered at length in *Keystone Transp. Co. Contract Carrier Application*, 19 M. C. C. 473, and the same problem with respect to defining the business of the applicant and the scope thereof is here presented. In granting authority herein, we shall accordingly adopt the general form of authority used in the cited case with appropriate modifications". (R. 22). (Italics ours.)

In that case, after four (4) years of operation under the Act, the Commission, Division 5, assumed the power for which it had theretofore emphatically held, in the *Longshore Contract Carrier Application Case*; 2 M. C. C., 480, 1 Federal Carrier Cases, 671, there was no warrant whatever in the Act, to restrict the business of the carrier and the scope thereof not only to certain specified commodities and within a specified territory but also to certain shippers or classes of types of shippers. In appellant's case, the Commission made the restriction to *food store commodities* even far narrower by limiting his entire bona fide "grandfather" operation as a contract carrier and an irregular common carrier to individual contracts with *food canneries* and *meat packing businesses*.

The Commission's Order was issued to limit appellant's operation in accordance with its above restrictive findings.

ASSIGNMENTS OF ERROR.

1. The District Court erred in finding that the restrictive provisions of the procedure on determining applications and issuing permits for new or extended operations, outlined in Sec. 209 (b) of the Motor Carrier Act, applied as well to "grandfather" applications and permits (R. 338-339; 343, 344).

2. The District Court erred in finding that, under the Act, the Interstate Commerce Commission had the power, in determining the "business of the carrier and the scope thereof" as provided in Sec. 209 (b), to restrict the "grandfather" carrier to not only the commodities he may transport and the territory he may cover but as well to the shipper or type of shipper he may serve (R. 340-341); that the "business" of the carrier meant simply the extent of his *individual operations* on July 1, 1935 (R. 340-341); and that the Commission's interpretation of the law in the *Keystone Case*, supra, is applicable to appellant's case because of similarity of facts (R. 341-342).

3. The District Court erred in finding that the order of the Commission, in not only restricting the service of the carrier to certain shippers, but in designating the comprehensive food and manufacturing extent of the shippers' business within the narrow bounds of some major product or special branch of the shipper's business, such as "food canneries" and "meat-packing businesses," in appellant's case is valid (R. 349).

4. The District Court erred in finding, in the face of its own Primary Findings of Fact that appellant, during his "grandfather" period operated in his territory *between* points in Minnesota, Wisconsin, Iowa, Illinois and North

Dakota, that the order of the Commission restricting the appellant to an operation merely *from* certain points and places *to* certain destinations is valid (R. 334, 347, 349).

5. The District Court erred in finding, in the face of its own Primary Findings and the Commission's Findings that appellant, during the "grandfather" period, under his common carrier permit transported a wide range of *general commodities*, between Chicago and the Twin Cities area, that the order of the Commission, restricting these commodities to *fresh meats, canned foods, dairy products and packing house products and supplies*, is valid. (R. 21, 22; 334; 349).

6. The District Court erred in finding that the interruption of service to Kraft-Phenix Cheese Corporation under written contract made by appellant prior to July 1, 1935, was not part of his "grandfather" operation under Section 209(a) for the reason that the actual transportation of the Corporation's products was not commenced till after the crucial "grandfather" date, and further erred in its failure to find that such interruption of service was beyond the control of the carrier (R. 344-345).

7. The District Court erred in finding that the appellant may do no more than continue operations under contracts with Swift & Company as a meat packing concern and with Libby, McNeil & Libby as a food canning business and that he may substitute or add only such other contracts for the transportation of similar property for food canners and meat packers in the territorial area covered by him on the crucial date (R. 343).

8. The District Court erred in finding that the Commission's order was made after a full hearing and that the order was supported by the Findings of Fact (R. 348, 349).

9. The District Court erred in finding that appellant has not been injured by the interpretation given the Act by the Commission.

ARGUMENT.

The foregoing assignments of error, while not all individually and specifically elaborated upon in this brief as a matter of conciseness, are intended to be urged and are clearly apparent in the consideration of the points of fact and of law in this case hereinafter presented and of which the following is a summary:

SUMMARY.

FIRST POINT: Congress intended, and clearly expressed its intent in the statute, Sec. 209 (a) and (b) that permits for continuance of "grandfather" operations of contract carriers who were in bona fide operation on July 1, 1935, and continuously since, shall be more liberal, flexible and elastic than permits for new or extended operations; and that the procedure on applications for said permits shall be less formal and restrictive.

a) Any other construction of Secs. 209 (a) and (b) would invalidate the provisos in both.

SECOND POINT: Nowhere in the statute is any authority or power given the Commission, either directly or by implication, to circumscribe the contract carrier's "grand father" business and the scope thereof with a limitation of his operation to certain shippers or types of shippers.

a) The Commission, in the *T. B. Longshore Contract Carrier Application Case*, supra, itself has firmly and emphatically held for some years after the passage of the Act that it has no such authority and power even in issuing permits for new or extended operations.

b) The Commission, without any amendment of the Act warranting a construction that, in determining the business of the carrier and scope thereof, it may limit the carrier to certain shippers of types of shippers, reversed its own definite and emphatic interpretation of the Act in the unique and unusual case of *Keystone Transportation Company Contract Carrier Application*, supra (R. 342), and, erroneously alleging a similarity of facts in appellant's case, applied that interpretation of the Act to the latter case.

c) *Longshore* case and *Keystone* case differentiated, showing similarity of facts of appellant's case with those in *Longshore* case, and dissimilarity with facts in *Keystone* case.

d) Congress itself has prescribed the standards for determining the business of the carrier and the scope thereof, and the Commission cannot substitute standards of its own for that determination.

THIRD POINT: If the restriction of the carrier's business and the scope thereof to certain shippers or types of shippers be nevertheless held authorized under the act, the designation of the shipper's business cannot be capricious or arbitrary, but must embrace the entire scope of the business of the shipper and of the shipper's subsidiaries, and not merely a major product or special branch of their busi-

ness, especially when the "grandfather" contract of the carrier with the shipper calls for transportation of *all* of the shipper's products and of *all* the products of the shipper's subsidiaries, as directed, and the carrier, prior to, on and subsequent to July 1, 1935, has continuously transported such products.

FOURTH POINT: Appellant's bona fide "grandfather" operation was a *territorial* operation, carried on *between* all points and places in said territory as directed by the shippers

a) The fact that a commodity of the shipper has never or only sporadically been transported between certain points in that territory does not warrant the withholding of authority so to do, and the Commission exceeded its authority in restricting appellant's territorial operation to transportation only *from* certain designated points in that territory *to* points of destination therein.

FIFTH POINT: In determining the business, and its scope, of a contract carrier who was in bona fide "grandfather" operation as both a general contract carrier over irregular routes within a designated territory and an irregular carrier of general commodities (with exceptions) over regular routes within the same territory, the latter operation if carried on to povide the carrier with a balanced operation and a profitable back-haul movement is not a dual operation prohibited by Sec. 210 of the Act, and, if it be considered a dual operation, good cause is shown in appellant's case for its continuance.

SIXTH POINT: The statute clearly provides that there shall be included in the permit for the continuance of a "grandfather" operation any regular or seasonable service in which there was an interruption on July 1, 1935, over which the carrier had no control; and therefore appellant's service for Kraft-Phenix Cheese Company, now known as Kraft Cheese Company, under contract entered into prior to July 1, 1935, was improperly excluded from appellant's bona fide "grandfather" operation.

SEVENTH POINT: The denial to appellant of a fair hearing by the Commission and the irreparable injury that will result to appellant from the enforcement of the Commission's restrictive order deprives him of his property without due process of law and is repugnant to and in conflict with the Fifth Amendment to the Constitution of the United States and the statute.

FIRST POINT.

Congress intended, and clearly expressed its intent in the statute, Section 209 (a) and (b), that permits for continuance of "grandfather" operations of contract carriers who were in bona fide operation on July 1, 1935, and continuously since, shall be more liberal and elastic than permits for new or extended operations; and that the procedure on applications for said permits shall be less formal and less restrictive.

The lower Court, while stating in its findings that the Commission is authorized not only to administer the Act but also to interpret it (R. 336), very aptly states further that the Act itself defines the powers and duties of the Commis-

sion pertaining to the questions with which we are concerned (R. 337). It follows, that the Commission's interpretation of the Act as to its powers and duties must conform to [illegible] definition and to the intent of Congress as deduced from the clear language of the Act, which language, as the lower Court has found, is plain and simple (R. 341).

The pertinent and applicable provisions of the Motor Carrier Act of 1935, as amended in 1940 by what is now known as the Interstate Commerce Act, Part II, are the following:

Section 203 (a), as amended, provides:

> (15) "The term 'contract carrier by motor vehicle' means any person which, under individual contracts or agreements, engaged in the transportation (other than transportation referred to in paragraph (14) and the exception therein) by motor vehicle of passengers or property in interstate or foreign commerce for compensation."
>
> (14) "The term 'common carrier by motor vehicle' means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, except transportation by motor vehicle by an express company to the extent that such transportation shall continue to be considered to be and shall be regulated as transportation subject to part I."

By this section, Congress has defined and described the "business" of the carrier, as "one who engages in the transportation of *passengers* or *property*"—a contract carrier, under individual contracts; and a common carrier by holding himself out to the general public as such.

The lower Court erroneously, but no doubt inadvertently, held applicable to appellant's case the above sections of the law as they were before being amended by the Interstate Commerce Act (R. 340). While the omission of the more comprehensive and clarifying amendment of Sec. 203 (14), as to questions here considered, do not directly affect the issue, the omitted amendment of Sec. 203 (15) has a vital bearing upon that issue and should have been considered and invoked in the lower Court's decision.

The original provision of Section 203 (15) as quoted by the lower Court provided that "the term contract carrier by motor vehicle" means any person * * * who or which, under *special* and individual contracts * * * transports passengers or property in interstate a foreign commerce by motor vehicle for compensation". The amendment has eliminated the word "special" and now makes it clear that Congress did not intend that the business of a contract carrier and the scope thereof shall be predicated upon *specialized service* peculiar to the needs of particular shippers, but only upon individual contracts with shippers.

The arguments and briefs of counsel in the lower Court emphasized *special contracts* and *specialized service* as warranting the Commission to assume the power to restrict the carrier in his "grandfather" operation to the shippers with whom such special contracts were made or for whom specialized services were rendered.

The amendment of that Section simply makes definitely clear that no such power, predicated upon special contracts or specialized service, was ever intended to be conferred upon the Commission. The Commission and the lower Court erred in not giving due consideration to this amendment.

In adding refrigeration to his equipment as required, the appellant merely exercised his right under the proviso of Sec. 209 (b) "to add to his equipment and facilities as the development of the business and the demands of the public may require".

The power of the Commission to regulate contract carriers by motor vehicle after their rights as contracts carriers by motor vehicle have been definitely established and a permit issued under a proper interpretation and application of the act pursuant to the tests and standards prescribed by Congress, is set forth chiefly in Sec. 204 (a) (2) and (6) and (7) of the Act:

> Sec. 204. (a) It shall be the duty of the Commission—
>
> (2) To regulate contract carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.
>
> (6) To administer, execute, and enforce all provisions of this part, to make all necessary orders in connection therewith, and to prescribe rules, regulations and procedure for such administration; and
>
> (7) For purposes of the administration of the provisions of this part, to inquire into the management of the business of motor carriers and brokers, and into the management of the business of persons controlling, controlled by, or under common control with, motor carriers to the extent that the business of such persons is related to the management of the business of one or more motor carriers, and the Commission shall keep itself informed as to the manner and method in

which the same are conducted, and may obtain from such carriers and persons such information as the Commission deems necessary to carry out the provisions of this part; and may transmit to Congress from time to time, such recommendations (including recommendations as to additional legislation) as the Commission may deem necessary.

These premises bring us now to a consideration of the primary Section of the law involved in this case and which together with Sec. 203 (a) heretofore quoted, confer upon contract carriers in bona fide operation on July 1, 1935, "grandfather" rights, and in which Congress prescribes the method and manner of protection of these rights together with the tests and standards by which the Commission shall consider and act upon applications therefor and issue permits thereunder.

Sec. 209. (a) provides:

"Except as otherwise provided in this section and in section 210a, no person shall engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce on any public highway or within any reservation under the exclusive jurisdiction of the United States unless there is a force with respect to such carrier a permit issued by the Commission, authorizing such person to engage in such business: Provided, That, subject to section 210, if any such carrier or a predecessor in interest was in bona fide operation as a contract carrier by motor vehicle on July 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or, if engaged in furnishing seasonal service, only, was in bona fide operation on July 1, 1935, during the season ordinarily covered by its operations, except in either instance as to interruptions

of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such permit, without further proceedings, if application for such permit is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect and if such carrier was registered on July 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such permit. Otherwise the application for such permit shall be decided in accordance with the procedure provided for in paragraph (b) of this section and such permit shall be issued or denied accordingly. Pending determination of any such application the continuance of such operation shall be lawful. * * * "

Sec. 209 (b) provides:

"Applications for such permits shall be made to the Commission in writing, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission may, by regulations, require. Subject to section 210, a permit shall be issued to any qualified applicant therefor authorizing in whole or in part the operations covered by the application, if it appears from the applications or from any hearing held thereon that the applicant is fit, willing, and able properly to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this part and the lawful requirements, rules and regulations of the Commission thereunder, and that the proposed operation, to the extent authorized by the permit, will be consistent with the public interest and the national transportation policy declared in this Act; otherwise such application shall be

denied. The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof and shall attach to it at the time of issuance, and from time to time thereafter, such reasonable terms, conditions, and limitations consistent with the character of the holder as a contract carrier as are necessary to carry out, with respect to the operations of such carrier, the requirements established by the Commission under section 204 (a) (2), and (6): Provided, however, That no terms, conditions, or limitations shall restrict the right of the carrier to substitute or add contracts within the scope of the permit, or to add to his or its equipment and facilities, within the scope of the permit, as the development of the business and the demands of the public may require."

Sec. 210, excepted from the aforesaid section, provides substantially that no dual operation as both a contract carrier and a common carrier shall be engaged in *except for good cause shown*, and Sec. 210 (a), also excepted, provides substantially that temporary grants of authority may be granted without further proceedings to enable the provision of service for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such needs.

It is admitted and conceded in the findings of the Commission and of the lower Court that the appellant's "grandfather" operation comes within the purview of the "grandfather" clause of Sec. 209(a), and that, on July 1, 1935, and continuously since, he was in bona fide operation as a contract carrier by motor vehicle in interstate or foreign commerce (R. 23, 333-334). The lower Court further found that appellant, in the "grandfather" period transported

general commodities under his common carrier permit from the State of Wisconsin, for the transportation of general commodities *between* Chicago, St. Paul and Minneapolis (R. 333-334). Such permits from other states in his territory were not then required. There was also no disputing evidence as to appellant's having been registered, on July 1, 1935, under a code of fair competition requiring registration. It is also conceded in the findings that appellant had, prior to July 1, 1935, entered into a valid contract for the transportation of the Kraft Cheese Company products within his territorial area, although the actual transportation of the Kraft products did not commence until March, 1936, by reason of the fact that the Kraft Company undertook a change in method of distribution of its products from Minneapolis and St. Paul.

Sec. 209 (a) specifically provides that "pending determination of any such application the continuance of such operation shall be lawful". Such determination is not final until, upon proper legal procedure, it is reviewed by the Courts. Until then, the *application* is the carrier's permit until it is so finally determined.

There is no dispute about the fact, and the lower Court so found, that the appellant has for more than eight years continuously operated efficiently and successfully, and by Sec. 209 (a) lawfully, under what he claimed in good faith to be his bona fide "grandfather" operation, and, under the proviso of Sec. 209 (b) prohibiting the Commission from imposing upon him any terms, conditions or limitations which would restrict his right to substitute or add contracts within the scope of his permit or to add to his equipment and facilities as the development of the business and the demands of the public may require, has added

and substituted numerous contracts and has, by large investments and at great expense, added materially to his equipment, facilities and personnel (R. 16-17; 334).

By all standards prescribed by Congress for determining "grandfather" operations, the appellant's operation came within the saving clause of Section 209 (a) of the Act. That Section, as indicated, provides, in substance, that a contract carrier whether engaged in a "grandfather" operation or whether he seeks to engage in a new or extension operation must have a permit from the Commission to operate. However, the prescribed method and manner of securing that permit for a "grandfather" operation even for interruptions of service beyond the control of the carrier is, by the very language of the Act, different and more liberal and elastic than the manner and method of securing a permit for a new or extension operation. The law (Sec. 209 (a) clearly set forth that if a contract carrier was in bona fide operation prior to and on July 1, 1935, and continuously since, the Commission *shall* issue him a permit therefor *without further proceedings*. If, however, he is not shown by his application to have "grandfather" rights, then and then only his application shall be determined by the restrictive *procedure* in Sec. 209 (b), and the permit shall be issued or denied *accordingly*.

Surely, Congress, by this clear, mandatory direction to the Commission in "grandfather" operations in Sec. 209 (a), viz: "the Commission shall issue such permit without further proceedings" intended an entirely different and far more liberal action by the Commission on such applications and the issue of such permits than on the applications of carriers who were not bona fide operators prior to July 1,

1935. Sec. 209 (a) requires only, as to "grandfather" operations that the application therefor be filed as provided in Sec. 209 (b), but specifically makes the restrictive procedure provided in (b) inapplicable to "grandfather" applications. Congress thus indicated its intention clearly that permits for "grandfather" operations were not to be so restrictive as to freeze the applicant into the precise pattern of his prior activities.

This differentiation as to procedure cannot be held to be meaningless and mere verbiage. It is a definite standard set by Congress for determining "grandfather" rights and issuing permits thereunder and the Commission can not substitute a standard of its own in that particular.

The lower Court erroneously determined that the procedure of Sec. 209 (b) for new or extension operations was applicable to appellant's "grandfather" case. The Court stated:

> "Section 209 (b) outlines the procedure for acquiring the permit and what the permit shall contain. It requires a carrier to show that he is able to render the service of a contract carrier, that he is willing to conform to the law and the lawful requirements of the Commission, and that the proposed operation will be consistent with the public interest and the declared policy of Congress; it further provides that 'the Commission shall specify in the permit the business of the Contract Carrier covered thereby and the scope thereof'" (R. 338-339).

Even if the provision that the Commission "shall specify in the permit the business of the contract carrier and the scope thereof" be held not part of the procedure provided only for new and extension operations but that this direc-

tion to the Commission is applicable to all permits, it does not alter or detract from the clear, expressed and unmistakeable intent of Congress that a "grandfather" operation, in the light of the special "grandfather" clause and the special proviso as to "addition of contracts, etc." shall be more liberally and elastically construed and his business and the scope thereof shall encompass all of his "grandfather" operation, including any and all additions or substitutions of contracts within the scope of his bona fide business as a motor carrier. Even under the very language of the Act (Sec. 209 (b), the only terms, conditions and limitations the Commission may attach to the business of the contract carrier and the scope thereof are definitely set forth to be such as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the Commission under Sec. 204 (a) (2) and (6), —all of which are provisions for regulations of operation under the permit when issued and cannot be construed as the basis for restrictions or limitations of the permit itself.

Congress having provided specifically in Sec. 209 (a) that, if the operations of the carrier is not a "grandfather" operation, it shall be *decided* in accordance with the *procedure* provided in paragraph (b) of this section *and such permit shall be issued or denied accordingly*, the reasonable and logical construction of the "grandfather" clause can mean but one thing, to-wit: that, in "grandfather" cases, such permit shall not be issued or denied according to that procedure, but as definitely stated by Congress, *shall* be issued by the Commission *without further proceedings*, as a matter of right. In other words, if the Commission nevertheless does undertake to specify in the

"grandfather" permit the business of the contract carrier and the scope thereof, it can do no more than specify that business as a contract carrier of passengers or *property* (commodities) as set forth by Congress itself in Sec. 203 (15) of the Act, and determine, by virtue of the language in the "grandfather" clause, viz., "if such carrier was in bona fide operation as a contract carrier by motor vehicle on July 1, 1935, over the route or routes within the territory for which application is made", the *route or routes or the territory over which or within which the carrier may operate.* In none of the provisions of the Motor Carrier Act, applicable to "grandfather" permits, has Congress used any language that could legally be interpreted as granting authority to the Commission to restrict the business of the carrier, or limit its scope to certain shippers or types of shippers. There is no warrant whatever for any restriction in a "grandfather" permit other than a restriction as to commodities and routes or territory. This premise of proper interpretation of the law brings us to a consideration of the Second Point involved in this case:

SECOND POINT.

Nowhere in the statute is any authority or power given the Commission, either directly or by implication, to circumscribe the contract carrier's "grandfather" business and the scope thereof with a limitation of his operation to certain shippers or types of shippers.

For more than four years after the passage of the act, the Interstate Commerce Commission itself, in its interpretation, administration and enforcement of the Act, repeatedly held, "after much study" as Commissioner Lee stated,

that, under the Motor Carrier Act, it was "without authority to attach any terms, conditions or limitations to a permit of a contract carrier which would restrict the right of the carrier to substitute or add contracts within the scope of the permit" and that *"the scope of the permit as used in Section 209 (b) relates to the routes or territory which the carrier may serve, and the commodities which it may transport, and not to the shipper or shippers to whom it may render its service."*

In the *Longshore Case*, supra, decided July 23, 1937, the Commission held to that interpretation, and literally thousands of "grandfather" applications were determined and permits issued by the Commission to motor carriers based upon that interpretation, as pointed out by Commissioner Lee in his dissenting opinion in the *Keystone Case*, supra.

That was the interpretation given the Act by the Commission prior to and at the time appellant filed his application in February, 1936, for a "grandfather" permit, and the form of application prescribed by the Commission and the hearing thereon in September, 1938, were in conformity to that interpretation.

It was not until after four years of insistance by the Commission that no other interpretation of the law was warranted, namely, not until October, 1939, and without having transmitted to Congress "such recommendations (including recommendations as to additional legislation) as the Commission may deem necessary" as provided in Sec. 204 (7) of the Act, and without any amendment authorizing a designation of the shipper in the permit having been made by Congress, that the Commission, apparently

to alleviate its administrative chore in the regulation of the large number of operators who applied for permits at one and the same time, and under the erroneous interpretation of the law that "the underlying purpose of the Act is plainly to promote and protect adequate and efficient *common carrier* service," conveniently discarded that interpretation and held, in the unusual and unique Keystone Case, supra, that "the business of the carrier and the scope thereof" also relates to the particular shippers or class of shippers to whom he may render his service." The lower Court erred in affirming that new interpretation and its application to appellant's case on the ground that a differentiation of the Longshore Case and the Keystone Case indicated a similarity of facts in appellant's case with the facts in the latter.

It is significant, that neither the bona fide operation of the carrier in the Longshore Case nor the operations of the carriers in the Keystone Case were strictly or exclusively "grandfather" operations. The operation in the Longshore case was not commenced until on or about August 15, 1935. In that case, the Commission determined the application, filed February 10, 1936, and issued the permit under the restrictive procedure in Section 209 (b) of the Act provided for new and extension operations; and yet, even in applying that restrictive procedure under which the applicant was obligated to prove "that he is fit, willing and able properly to perform the service and to conform to the provisions of the act and that the operation will be consistent with the public interest and the policy declared in Section 202 (a) of the Act"—all of which he need not prove for the issuance of a "grandfather" permit—the Commission held

that the "scope of the permit", as used in Section 209 (b) relates only to the routes or territory which the carrier may serve and to the commodities which he may transport, and not to the shipper or shippers to whom he may render his service.

In the Keystone case, 38 truck drivers, for a private carrier, on August 28, 1937, filed applications for authority to institute new or extension operations. Just prior to filing the applications, the applicants, as the Commission found, served solely the American Stores Company, a chain grocery store operator, as bona fide, *full time employees*, in the capacity of truck *drivers* of *company-owned* equipment; and that, for several reasons including labor troubles, the company desired to withdraw completely from private operation and to use independent contract motor carriers. In its territory, the company owned and operated approximately 2,700 retail food stores. The applications of 38 private carriers—merely employees—were joined with 83 applications filed by carriers seeking "grandfather" rights, by virtue of their service for the Great Atlantic & Pacific Tea Company, said applications representing a portion of approximately 600 applications filed by motor carriers serving the company. The service of these 83 carriers for the company, the Commission found was similar to that proposed to be rendered by the American Stores Company's carriers.

The Commission, on November 20, 1937, under its adopted practice of disposing of "grandfather" applications informally by the issuance of so-called compliance orders, entered such an order initially on one of the applications (No. MC-2062, *Thomas Jones Contract Carrier Application*), authorizing the carrier to transport, in the terri-

tory authorized, "such merchandise as is dealt in by wholesale, retail and chain grocery and food business houses, and in connection therewith, equipment, materials, and supplies used in the conduct of such business; also fruits, vegetables, farm products, poultry, and sea food, in the respective seasons of their production". Objection was made by applicant on the ground that the Commission had exceeded its powers in fixing the limitations contained in the order, but the order was later accepted. Thereafter, the Commission began entering orders containing similar language in other applications covering service for the company, one of which was the original order in the Keystone case. The Commission had not, up to that time, even in the Keystone case, found any warrant in the law for the designation of the shippers or types of shippers the carrier may serve.

However, objections were filed by the common carriers, principally rail carriers, alleging that the operating authority granted to the applicants was too broad and should be restricted to authorize operations under *special* or individual contracts with *only such persons who operate retail stores, the chief business of which is the sale of food.*

The protesting common carriers further contended that the term "business of the contract carrier" as used in section 209 (b) means the precise operation conducted. This contention, however, has been set to rest by the decision in the case of *U. S. v. Caroline Freight Carriers Corporation*, 9 Sup. Ct. Rep. 722-727-729, in which this Court held:

> "This Act should be liberally construed to preserve the position which those like appellee have struggled to obtain in our national transportation system. To

freeze them into the precise pattern of their prior activities as was done here not only may alter materially the basic characteristics of their service; it also may well be tantamount to a denial of their statutory rights."

The contract carrier applicants as a whole maintained that the Act was designed to give them a standing in the transportation world equal to that accorded motor common carriers. That view is supported by the following language of the "National Transportation Policy" added to the Amendment of 1940 to the Act:

"It is hereby declared to be the national transportation policy of Congress to provide for fair and *impartial* regulation of *all* modes of transportation subject to the provisions of this act, *so administered as to recognize and preserve the inherent advantages of each;* * * *." (Italics ours.)

Where an important Act is preceded by a declaration of policy, such policy becomes a guide to the construction of the terms and provisions of the Act itself.

The contentions of the applicants in the Keystone case is further supported by the decision of this Court in the case of *U. S. et al. v. V. L. Rosenblum Truck Lines, Inc.*, 62 Sup Ct Rep 445, which was analogous to the Keystone case in that the carriers were not independent operators serving the public but in effect private carriers who only served certain common carriers, and in which this court held:

"The Act clearly contemplates that contract and common carriers will offer competing types of service."

The applicants further contended that specifications in permits of the shipper or shippers to be served are unlaw-

ful and would destroy the contract carrier, and that if a contract carrier loses his contract or contracts held at the time the permit is issued, he, if limited to the transportation of named commodities for a certain shipper or a class of shippers, would be forced out of business, a thing clearly not contemplated by the Act.

Clearly then, while, even in its initial order in the Keystone case, the Commission held to its former interpretation of Section 209 (a) and (b) in the Act, that it definitely had no authority, in specifying the "business of the carrier and the scope thereof", to restrict the service of the carrier to certain shippers or types of shippers; nevertheless, having evidently become common carrier minded by reason of its dealing almost exclusively with railroads (common carriers) from 1888 when the Commission was established to 1935 when the Motor Carrier Act was passed, was undoubtedly impressed by arguments and objections of the competing common carriers to its initial order in the Keystone case and thus conveniently reversed its former interpretation and amended its initial order so as to restrict the Keystone carriers to service, not only as to the commodities to be transported and routes or territory to be covered, but also as to certain shippers or types of shippers the carriers may serve.

Yet, the Commission itself, conceding that the Keystone case presented an unusual situation in contract carriage, expressed some uncertainty as to the legality of the reversal of its former interpretation of the law. It said:

> "It does not follow that we are required to include in each and every permit a rigid or technical summary for defining the transportation business covered thereby or the scope thereof."

By what logic, or on what legalistic grounds the Commission applied that interpretation to appellant's case is certainly not clear. The facts in appellant's case are very dissimilar from the facts in the Keystone case. The status of the carrier was different. The operation was different. His was a status and an operation more analogous to that in the Longshore case. His was a strictly bona fide "grandfather" operation whereas in both the Longshore and Keystone cases the operation was not. The grant of his permit was a matter of right and not subject to the restrictive procedure in Section 209 (b) of the Act. His "grandfather" operation could not be restricted in the permit to the precise pattern of his prior activities, which restriction might be warranted in certain cases of new or extension operations.

In the Longshore case, the applicant sought a permit to operate as a contract carrier by motor vehicle of steel, steel products and materials and supplies used in the operation and maintenance of steel plants. Applicant had a contract with the American Rolling Mill Company to transport the commodities named from and to points described in the application. Trunk-line rail carriers and Barker Motor Freight, Inc., opposed the granting of the application.

They contended that applicant's service, if authorized, should be limited to transportation for the American Rolling Mill Company, more especially because applicant indicated a willingness to accept such limitation. However, the Commission refused to limit the transportation as requested, and refused to limit the operation to service for steel plants, on the ground that proper construction of the law did not give the Commission any authority to make such restriction; stating:

"The 'scope of the permit' as used in this section, relates to the routes or territory which the carrier may serve and to the commodities which it may transport *and not to the shipper or shippers to whom it may render its service.*" (Italics ours.)

The Commission found, the Longshore case, that the applicant owned two tractors and two 18-foot trailers of 10 and 12 tons capacity respectively; that he has operated at a profit in this service, is financially able to carry on his operations, follows good operating practices, holds a permit from the State of Ohio, is fit, willing and able properly to perform the service and to conform to the Commission's requirements, rules and regulations and that the operation will be consistent with the public interest and the policy declared in Section 202 (a) of the Act.

Appellant's status as a contract carrier and his "grandfather" operation, though encompassing a larger territory and a wider range of commodities, are similar to the status and operation of the carrier in the Longshore case; in fact, being a "grandfather" operator, appellant's status and operation, under the "Grandfather" Clause of Section 209 (a) are to be given a more liberal interpretation and a more comprehensive sphere. Appellant was in the general trucking business prior to the crucial "grandfather" date as both a contract carrier over irregular routes and an irregular carrier of general commodities (with exceptions) over a regular route within the described territory. Unlike the carriers in the Keystone case who were merely employees, as truck drivers, of a private concern, and who operated company-owned trucks and were not in business for themselves, he was an independent, individual operator who himself had built up his business, owned and operated his

own equipment and had constantly, at great expense, added to that equipment and to his facilities and personnel as the development of his business and the demands of the public required. He held an operating permit as an irregular carrier of general commodities from the State of Wisconsin (Rec. 334). His *main* or *principal* operation was set forth in his application to be that for Swift and Company, Libby McNeill & Libby, Plankinton Packing, *and others*, and the products he transported consisted of commodities generally, meats and packing house products specially.

To state these facts should indicate plainly the similarity of appellant's operation to that in the Longshore case and the dissimilarity to the Keystone case. Yet, in appellant's case, the Commission adopted the general form of authority used in the Keystone case, and not only materially restricted the commodities he transported and the territory he covered in his "grandfather" operation, but limited his service to certain shippers or types of shippers (R. 22-23). Appellant contends that this was an arbitrary and capricious restriction on the part of the Commission and a flagrant abuse of its power under the "Grandfather" Clause of the Act (Sec. 209(a)). Congress had definitely prescribed the tests and standards for determining the business of a contract carrier and the scope thereof in his "grandfather" operation and in issuing permits thereunder and the Commission was not warranted to ignore the clear intent and language of Congress by arbitrarily adopting tests and standards of its own in that determination.

In *U. S. et al v. Carolina Freight Carriers Corp.* (supra), this Court held:

> "There is no statutory warrant for applying to irregular route carriers a different or stricter test as to

commodities which may be carried than is applied to regular route carriers, * * * The statutory difference is only in the territorial scope and pattern of the operation."

In that connection, it is pertinent to point out that Commissioner Lee, who has had long public service on the supreme court of his state, dissented from the finding and conclusions in the Keystone case, especially with reference to the Commission's arbitrary assumption of power to so narrowly define the business of the contract carrier.

Commissioner Lee pointed out that *after much study*, the Commission had, prior to the Keystone case, concluded, as to "grandfather" operators, that they should be granted authority to continue the operation they were conducting on the "grandfather" dates, both as to territory and commodities transported; that, if a carrier had, for instance, been transporting stoves or clothing over the route or within the territory where he was operating on July 1, 1935, he should be permitted to continue to haul stoves or clothing for any person who had stoves or clothing to haul over his routes or within his territory. He stated that the Commission has *literally in thousands of cases* adhered strictly to that established policy, and that now, for the first time (in the Keystone case) the majority departed from that well-established policy and not only limited some contract carriers to certain commodities over specified routes or within defined territories, but also limited the service of these carriers to restricted, particular shippers. He said:

"They can haul potatoes, but not for the farmer who grows them; they can haul flour; but not for the miller who grinds it; they can haul canned goods, but not for

the canner. It is worthy of note here that the individual retail grocery store ordinarily does not ship freight; it is usually a receiver thereof. Consequently, insofar as these carriers are concerned, in the final analysis it is the chain store only, the A. & P. and the like, with whom they will be allowed to deal. It is my view that these carriers should be authorized to contract with anybody who has such shipments to be hauled within their respective territories. Limiting a carrier to transportation for particular shippers is a good deal like saying that a farmer must sell his product only to a certain class of persons. The practical effect of this decision is that the contract carrier must continue to secure business from a chain grocery company or go out of business. In some situations there may be two or three chain groceries in the territory, with which such carrier may exercise his valued right to contract, but in other cases there may be only one."

In further expressing his disagreement with this new and unauthorized interpretation and policy, and in upholding the sound and liberal construction of the Act contemplated by Congress and adopted in the Longshore Contract Carrier Case, supra, the Commissioner said:

"It is sought to justify this new doctrine largely on the ground that it is necessary to protect common carriers. However, the price of such protection would be too high, even if common carriers required it. Instead of it being the patent object of Congress to protect common carriers, I prefer to construe the law to mean that Congress intended that we deal evenly with both classes of carriers. The law does not, as argued in the report, authorize the protection of common carriers at the expense of contract carriers. Section 218 (b) merely prohibits us from giving any preference or advantage to contract carriers in their competition with com-

> mon carriers. What the law contemplates is that we shall so regulate the two classes of carriers as to preserve the benefits to the public from each. Under the act, this is to be accomplished primarily through the prescription of maximum and minimum charges for contract carriers. I insist that there cannot be spelled out of the act any intention on the part of Congress that contract carriers should be hamstrung for the benefit of other carriers."

We contend that this dissenting opinion expressed accurately the declared policy of Congress in the passage of the Act and interpreted correctly the provisions of the Act relating to the case at bar. This Court, in the *U. S. vs. Carolina Freight Carrier Corp. Case*, emphasized and practically affirmed that liberal construction.

While Commissioner Lee concurred in the particular finding of the Commission in appellant's case, to-wit: That appellant is entitled to a permit authorizing transportation of canned *goods* (a more comprehensive term than canned foods as used by the Commission), fresh meats, dairy products, packing house products and supplies, he did not concur in the restriction of the carrier's service to certain shippers or class of shippers (R. 24). His dissent from that restriction is therefore indicated.

To have refused to restrict the service of "literally thousands of competing contract carriers" to certain shippers or types or classes of shippers, under the interpretation of the law adopted by the Commission in the Longshore case, and now to insist on that restriction in appellant's "grandfather" case and in other contract carrier cases, is an unfair and prejudicial discrimination by the Commission between contract carriers themselves.

Appellant was, as stated, in the general trucking business as a contract carrier. He was gradually building up his business, and had acquired equipment for some time prior to his contract with Swift & Company. So also, prior to the Swift contract, he secured a permit from the State of Wisconsin for the transportation of general commodities. His subsequent contract with Swift & Company, Libby, McNeil & Libby and with Kraft Cheese Company prior to the effective grandfather date, were separate, individual contracts that merely emphasized and more clearly established his status as a contract carrier in his general trucking business. He could, prior to the effective date, transport property, with or without individual contracts with shippers. His applications for a permit and certificate, Docket Nos. MC 70830 and 70831, which were subsequently combined into one application, Docket No. MC 70830, were not applications merely for a permit and certificate to haul under special contracts only certain commodities and for special shippers or classes of shippers, but were predicated upon "grandfather" rights acquired in his territorial operation in his general trucking business. As a motor carrier of property, he had the right, even prior to the enactment of the Motor Carrier Act, to substitute or add as many contracts as he pleased and to add to his equipment and facilities as the development of his business and the demands of the public required. The Motor Carrier Act, by the proviso in Sec. 209 (b), merely confirmed his rights in that respect.

In a recent "grandfather" decision by this Court, in *Gregg Cartage and Storage Co. v. U. S. and Interstate Commerce Commission*, 63 Sup. Ct. Rep., 932, while an entirely different issue was there presented than presented in the case

at bar, being an issue on the question "whether, under Sec. 209 (a) of the Act, the bankruptcy of a carrier was an interruption of service over which the applicant had no control, and in which the Court decided that he had such control, the language of the dissenting opinion of three Supreme Court Justices, namely, Justice Douglas, who wrote the majority opinion in the *Carolina Freight Carriers Corp.* case and Justices Black and Byrnes, are very pertinent to this proceeding. They said:

> "Congress has provided that those who attained a position in the competitive transportation system should be allowed to retain the fruits of their struggle. We could not permit those statutory grants to be whittled away on the basis of technical and legalistic grounds which find no expression in the statute, however much the administrative chore may be alleviated."

The findings of the Commission set forth the fact that appellant did transport, prior and subsequent to July 1, 1935, *a wide range of commodities*, not confined to "canned foods, fresh meats, dairy products and packing house products and supplies" (R. 21). To confine appellant to the transportation of these products and restrict his service to certain classes of shippers whom he served during the "grandfather" period, when a large number of these products are not products of these particular shippers at all, is an unreasonable and preposterous restriction that materially abridges the appellant's "grandfather" operation.

The language of Circuit Judge Parker in the *Carolina Freight Carriers Corp. case* in the Circuit Court, Vol. 38, No. 3, Fed. Supp. p. 554, is pertinent to these observations. He said:

"'Grandfather' clauses are quite customary when the state first undertakes the regulation of an industry or profession; and so far as we are advised the position taken by the Commission with respect to these cases is quite without precedent. It is just as though a physician entitled to continue his practice under the 'grandfather' clause of a statute regulating the practice of medicine should be told that he could practice only in homes which he had formerly visited in his practice and would be allowed to treat only the diseases which he had formerly treated. We feel perfectly sure that if any such interpretation of the act had been suggested at the time of its consideration by Congress, it never would have been passed."

Under the disputed Order of the Commission, plaintiff is, for instance, permitted to haul butter for Swift & Company, but cannot haul butter for Libby, McNeil & Libby unless it be canned. He can transport peanut butter, sandwich spreads, mayonnaise and salad dressing for a packing house but cannot haul them for anyone else unless they are canned. He can haul canned goods for persons who operate merely food canneries, but cannot even haul canned foods for Derby Foods, Inc., not a cannery or a packing house, and yet a subsidiary or affiliate of Swift & Company, included in the Swift & Company contract, and for whom plaintiff has transported many other foods prior to July 1, 1935. He can haul fresh meats for a packing house, but cannot haul it for any meat or sausage concern unless it be a packing house. Such arbitrary and unreasonable restrictions in the Commission's order are, to say the least, legally, logically and economically unsound.

Even the language in the Commission's findings and order is vague and indefinite. For instance, no doubt the Commission intended that, insofar as appellant's contract with Libby, McNeil & Libby is concerned, he shall be permitted to haul all commodities produced and used by Libby; yet, under the restrictive language employed, he cannot transport anything but canned foods for that concern or, for any other food cannery. The war emergency has materially curtailed the manufacture and transportation of canned foods, and if such foods shall be prohibited entirely, the appellant could transport no commodities whatsoever for Libby, McNeil & Libby, or any other food cannery.

THIRD POINT

If the restriction of the carrier's business and the scope thereof to certain shippers or types of shippers be nevertheless held authorized, the designation of the shipper's business cannot be capricious or arbitrary but must embrace the entire scope of the business of the shipper and of the shipper's subsidiaries, and not merely a major product or special branch of their business, especially when the carrier's contract calls for the transportation of ALL of the products of the shipper and of his subsidiaries as directed, and the carrier was transporting such products on July 1, 1935, and continuously since.

In the Keystone case, the Commission broadly and comprehensively classified the shippers, American Stores Company and Great Atlantic and Pacific *Tea* Company as *general foods products concerns*. However, in appellant's case, after denial of any and all timely petitions of appellant for review, oral argument or reconsideration to deter-

mine, among other things, the general business of the shippers he served, namely Swift & Company and Libby, McNeill & Libby, and Kraft Cheese Company, who are all general foods products concerns and the subsidiaries and affiliates of these companies, and, without making specific findings as to what standard the Commission adopted for determination of the classification of these shippers, the Commission unreasonably, arbitrarily and unlawfully defined the shippers by the narrow designation of a special branch or major product of their business, designating Swift & Company as merely a "meat packing business", and Libby, McNeill & Libby as merely a "food cannery", and thus limited appellant's permit to persons who operate food canneries or meat packing houses. Thus the Commission destroyed the parity between appellant's future operation and his prior *bona fide* operation which the statute was designed to preserve.

Swift & Company, by its very Articles of Incorporation, in effect since 1917, and which were in evidence in the lower Court as plaintiff's Exhibit F, is a *general food products concern* (R. 330A-332), and has, since that time, continuously operated as such. In fact, those Articles list as the first object for which the company was formed: "to manufacture, buy, sell and deal in and with any and all foods." Its second object is stated to be "to manufacture, buy, sell and deal in and with any and all materials, articles, commodities and things which may be manufactured and converted into *foods or the by-products thereof*." The slaughtering of animals and conversion thereof into meats is only the third object stated. So also Libby, McNeill & Libby and Kraft Cheese Company, are general food products concerns, even though, as to the latter concern, the

word "cheese" forms part of the firm name, just as the word "tea" forms part of the firm name of the Great Atlantic & Pacific Tea Company.

Congress never intended to give the Commission unlimited power, in determining the "business of the contract carrier and the scope thereof" to restrict that business and scope to such narrow, arbitrary and unreasonable limits as are contrary to and inconsistent with the comprehensive definition of the *business* of the carrier given by Congress itself in the Act.

There has been no change or amendment in the law warranting a different interpretation. In fact, the 1940 Amendment of the Act strongly supports the interpretation given the Act in the Longshore case. As heretofore stated, the original Act, Sec. 203 (a) defined the business of a "contract carrier by motor vehicle" by designating such carrier as any person which, under *special* and individual contracts, or agreements, engages in the transportation of passengers or *property* in interstate or foreign commerce for compensation. The Amendment of 1940, in Sec. 203 (a) of the Act omits the word "*special*" with reference to the carriers' contracts and thus clearly re-affirmed the interpretation it intended in the first place and which the Commission had given the Act before the Keystone case, namely, that a contract carrier shall be considered to be in bona fide operation under individual contracts without *special* or *specialized service* to particular shippers. By that intentional omission in the Amendment of the Act, Congress gave its disapproval of the Commission's restrictive interpretation of the Act in the Keystone case, and, indicated clearly again that it withheld from the Commission the

power to designate the business of the carrier and the scope thereof by predicating it upon *special* contracts with or *specialized* service for certain shippers or class of shippers. Congress also, by that omission of the word "special" sought to wipe out and did wipe out the preference in business or protection the Commission contended, in the Keystone case, the common carriers should have.

Moreover, the Commission in its order and the U. S. District Court in its decision erred in failing to set forth or make any material reference to the ten or more subsidiaries and affiliates of Swift and Company and of Libby, McNeill & Libby, some of which, such as Derby Foods, Inc., also are general food products concerns which appellant, during the "grandfather" period, was not only obligated by contract to serve but did actually serve. Many of those subsidiaries and affiliates are in no sense "meat packing businesses" or "food canneries" or "cheese processing businesses", either in their primary business or incidental business. If a classification of the shippers be held to be authorized in the law and to be a necessary part of the specification of the business of the contract carrier and the scope thereof, then under the very provisions of appellant's contracts with and transportation for shippers, prior, on and subsequent of July 1, 1935, the business of all these subsidiaries and affiliates should have been also separately defined and classified and included in the grant of authority to appellant by the Commission. Otherwise, the Commission could resort to even a more drastic interpretation of the Act by further restricting appellant's business as a contract carrier and the scope thereof to an operation for only meat-packing businesses or food canneries *who have*

ten or more subsidiaries, or who have *no subsidiaries*, and thus practically confine his "grandfather" operation to an operation for Swift & Company only, or to an operation for some minor enterprise. To restrict a carrier's business to certain shippers or types of shippers, and especially to classify the business of shippers, in that connection, within the most narrow bounds by basing that classification on merely a major product in which the shipper deals, or on some special branch of his business is not only not warranted in law, but is utterly repugnant to the American way of living and of doing business, destroys individual initiative and enterprise, and subjects such carrier to the will of the shippers in his contractual business relations with them in that he must deal with these particular shippers or have no business at all.

As hereinbefore indicated, the Motor Carrier Act, Section 203 (a) (15), specifically defines the *business* of the motor carrier as either a carrier of *passengers* or a carrier of *property* and nowhere in the Act is that business defined as an operation for certain shippers or class of shippers.

Likewise, in the law, reference is made to both regular and irregular route carriers, and to the territory in which the carrier has operated or is to operate. (Secs. 203 (a) and 209 (a)).

The word "scope", as used in the Act, especially in Section 209 (b) of the Act, is the only word upon which the Commission can predicate its findings as to the *extent* of the carrier's business, which extent must be considered in relation to the Congressional definition of the carrier's business as either a carrier of passengers or a carrier of property, and the territory he serves as either a regular or irregular route carrier, or both.

There is nowhere in the law any authority or power given the Commission to go beyond a limitation as to passengers, property or territory of the carrier, or as to whether he is a regular-route carrier, or irregular route carrier, in his operation under his "grandfather" status.

The lower Court erred in holding that the scope of the business of the carrier has reference to his *individual operations*, stating:

> "Manifestly the intention was to vest in the Commission broad powers to determine and specify in the permit, by the use of adequate language to do so, the extent of the operations in which the Carrier might engage. The word 'scope' is a comprehensive term as used in the Act and is for the purpose of enabling the Commission to prescribe a limited or an extensive range of *operations* in accordance with the rights of the carrier as determined by the character and extent or the service furnished on July 1, 1935" (Rec. Doc. No. 7, p. 11). (Italics ours.)

There is nothing in the language of the Act to warrant such interpretation. The language of the Act is plain and simple as the lower Court itself has said (R. 341). It is not subject to the interpretation given it by the lower Court. The language clearly and simply sets forth that the Commission shall specify in the permit the *business* of the carrier and the *scope thereof*, and not his individual operations and their scope.

If there be any ambiguity in the law, Section 209 (b), reference in clarifying that ambiguity and disclosing the true intention of Congress is had to discussions and hearings by Congress on the Bill before its passage.

When the Bill, which later became the Motor Carrier Act, 1935, was placed before the Senate Committee on Interstate and Foreign Commerce by Commissioner Eastman, who was then Federal Coordinator of Transportation, Section 209 (b) provided that:

> "The Commission shall specify in the permit the *operations* covered thereby and the scope thereof * * *"

The Senate Committee eliminated the word "operations" and substituted for it the "*business* of the contract carrier."

This change made by the Senate Committee shows clearly that Congress did not intend that the Commission shall specify, in the permits of contract carriers, the individual operations conducted on the "grandfather" date, but rather that the Commission shall specify, in the permit, a comprehensive statement of the *business* in which the carrier was engaged, under the classification set forth by Congress itself, as either a carrier of passengers or carrier of property and as a regular or irregular route carrier.

If any doubt exists that this was the true intent of Congress in making the change, the following statement made by Senator Wheeler on the floor of the Senate in explanation of this change certainly clarifies that doubt.

> "* * * This section (referring to Section 209) has been changed in lines 19-22, page 27, to make clear that the bill applies to the *business* of contract carriers and not merely *operations* under the individual contracts." 79 Cong. Rec. 5654. (Italics ours.)

If Congress had intended to restrict the business of the carrier to his individual operations and related operations, it would have used a restrictive word such as "limits" or

"limitations" thereof. Congress, however, instead used the word "scope". The word "scope" in its natural and usual meaning and as defined by Webster is certainly not a restrictive term. It is an all-comprehensive term, and means "amplitude of opportunity"; "free course or vent"; "range"; "length"; "extent"; "sweep". As used in the Motor Carrier Act "The business of the carrier and the scope thereof," it is relative term. The Commission is to state in the permit of the carrier, the "scope of the commodities" carried, and the "scope of the territory" covered. If it now be held as was held by the Commission in the Keystone case, that the classification of the shipper also comes within the meaning of the word "scope", though no amendment of the law has directly or by implication made that inclusion, then also, where appellant's contract called for transportation of any and all of the shipper's products as directed, the *entire scope* of the shipper's business the "extent" thereof, the "sweep" thereof, is to be stated, and not his business given a very restrictive classification by simply designating, as the shipper's business, a major product he deals in, or a special branch of his business. Such a narrow classification of the business of the shipper circumscribes the carrier's "grandfather" rights to a mere semblance of his bona fide "grandfather" operation.

FOURTH POINT.

Appellant's bona fide "grandfather" operation was a TERRITORIAL operation, carried on between all points and places in said territory as directed by the shippers.

a) The fact that a commodity of the shipper has never or only sporadically been transported between certain points in that territory does not warrant withholding of authority so to do, and the Commission exceeded its power in restricting the territorial operation of appellant to transportation FROM certain designated points in that territory TO points of destination therein.

The Commission, in its findings, stated as to appellant's contract with Swift & Company in November, 1934:

> "Under the agreement, applicant's two trucks were placed at the exclusive disposal of Swift and its subsidiaries for use *within its South Saint Paul trade or shipping area, and also out of its Chicago Plant*, and applicant hauled truckloads of 'plant sales' under seal from South St. Paul plant to Swift branch houses and to certain break-bulk points, where the commodities were unloaded for subsequent local delivery or reshipment to consuming points by local truckers" (R. 16).
>
> "Applicant's *principal* operations have consisted of rendering a specialized transportation service in hauling packing-house products from the Swift plant at South St. Paul for delivery to Wisconsin points, following which the truck proceeds to Chicago or Blue Island to pick up loads at the plant of Swift and Libby, respectively, for delivery into Minnesota" (R. 17). (Italics ours.)

The Commission, failed to set forth the important and pertinent facts, that appellant was in the general motor

transportation business prior to November, 1934, and that Swift, Libby and Kraft contracts were simply operations that were part of his contract carrier business, though they may have developed into major operations in that business. The Commission also erroneously predicated its restriction to service for certain shippers upon *specialized* service rendered these major shippers.

We have already heretofore shown that Congress, by the amendment of the Act in 1940, eliminated "specialized" service as a factor in determining the rights of contract carriers with respect to their "grandfather" operation.

The lower Court, in its findings upon the record, set out the facts of the case more clearly and accurately, as follows:

> "The plaintiff (appellant) began a motor carrier transportation business in September, 1934, when he obtained a common carrier permit from the State of Wisconsin for the transportation of general commodities *between* Chicago, St. Paul and Minneapolis. In November, 1934, he entered into a contract with Swift & Company for the carriage of merchandise for that company and its affiliates *in the trade territory of its South St. Paul packing plant which required him to operate between points in Minnesota, Wisconsin, Iowa, Illinois and North Dakota.* Proper licenses and permits were issued by the various states for these operations. A similar contract was made by plaintiff in February, 1935, with Libby, McNeil & Libby, and *under his common carrier permit, he transported general commodities.* The plaintiff, June 1, 1935, made a contract with the Kraft Cheese Company for transportation of its products *generally* westward from Green Bay, and Plymouth, Wisconsin, and northward from Chicago and Freeport, Illinois" (R. 333-334). (Italics ours.)

On the face of the findings of both the Commission and the lower Court, it is quite clear that appellant's operation was definitely a territorial operation, and not one merely from and to fixed termini. The Commission found that his operation was *within the Swift & Company South St. Paul trade or shipping area and also out of its Chicago Plant.* The lower Court found that the territorial extent of his operation for Swift & Company and its affiliates was *in the trade territory of its South St. Paul packing plant which required him to operate between points in Minnesota, Wisconsin, Iowa, Illinois and North Dakota.* His contracts provided that he must transport any and all the products of the shippers and their subsidiaries in this territory as directed. He did, during the "grandfather" period, transport, and has continuously transported these products within the designated territory as directed, over irregular routes (R. 68-69). That, the appellant, during the "grandfather" period, did not transport all of the shipper's commodities, or those he did transport, to all points in his territory, does not warrant a restriction of his future operation to the precise points or area he served.

In *Alton Railroad Co. v. United States*, 62 Sup. Ct. Rep., 432, this Court said:

> "'Territory' is not a word of art, and the characteristics of the transportation service involved as well as the geographical area serviced are relevant to the territorial scope of the operation which may be authorized under the 'grandfather' clause. * * *"
>
> "While the test of a 'bona fide' operation within a specified territory includes 'actual rather than potential or simulated service', it does not necessarily restrict future operation to the precise points or area to be served."

In the case of *U. S. v. Carolina Freight Carriers Corp.* supra, this court, in holding that the same tests and standards that applied to a regular route carrier must also be applied to an irregular route carrier, further held:

> "If the applicant has established that he was in 'bona fide operation' during the critical periods *in a specified territory*, restrictions on commodities which could be moved in any one direction *or between designated points* would not be justified. The fact that a particular commodity has never been transported between certain points in that territory would not mean that authority to haul it between them should be withheld. • • • For this Act should be liberally construed to preserve the position which those like appellee have struggled to obtain in our national transportation system. To freeze them into the precise pattern of their activities as was done here not only may alter materially the basic characteristics of their service; it also may well be tantamount to a denial of their statutory rights." (Italics ours.)

That the Court's ruling applies as well to a contract carrier as it does to a common carrier, and even with greater force to the former, is obvious for the reason that a contract carrier who has entered into a contract to transport the shipper's products between any and all points in a designated and prescribed territory and is operating under that contract, is already presently obligated to cover the territory as directed while a common carrier's coverage of his territory is dependent on his future anticipated patronage.

We maintain therefore that, in the face of the Commission's and the lower Court's own findings, it was error to restrict appellant's "grandfather" operation from certain

designated points within his territory to points of destination.

FIFTH POINT.

In determining the business, and its scope, of a contract carrier who was in bona fide "grandfather" operation as both a general contract carrier over irregular routes within a designated territory and an irregular carrier of general commodities over regular routes within the same territory, the latter operation, if carried on to provide the carrier with a balanced operation and a profitable backhaul movement is not such a dual operation as is prohibited by Sec. 210 of the Act.

The lower Court, found, as heretofore stated, that "appellant began his motor carrier transportaiton business in September, 1934, when he obtained a common carrier permit from the State of Wisconsin for the transportation of general commodities between Chicago, St. Paul and Minneapolis; that under certain contracts with Swift & Company, Libby, McNeil & Libby and Kraft Cheese Company, he transported their products in his territory, and, under his common carrier permit, he transported general commodities" (R. 333-334).

Appellant has always been engaged in a balanced operation and he never at any time contemplated or intended to operate his motor vehicles empty or partially empty in any direction. Only a balanced operation can be economically sound, and is in harmony with the spirit and intention of the national transportation policy and the provisions of the Act.

The war situation has forcibly emphasized the economic necessity and importance of a constant substantial return load in the motor carrier service of today. The vital need of conservation of motor equipment as well as the economic importance of avoiding delays in transportation has become pronounced.

The Commission found that, prior to July 1 and through October 15, 1935, applicant's operation was predominantly *to* Chicago and Milwaukee, to which there have been numerous shipments (R. 18). The operation for Swift and for Libby alone did not however provide for appellant a profitable back-haul, and appellant transported general commodities from Chicago and Milwaukee to the Twin Cities area to meet that deficiency, and the lower Court found this as fact.

However, the Commission, while finding that appellant had transported a wide range of commodities from Chicago to the Twin Cities (R. 21-22), restricted him to fresh meats, canned foods, dairy products and packing house products and supplies in his operation from Chicago to St. Paul, Minneapolis, South St. Paul, Minneapolis, South St. Paul, Winona and Rochester, Minnesota, and La Crosse, Wisconsin, over irregular routes (R. 23). The lower Court erred in affirming that restriction (R. 349).

Appellant's operation of general commodities over a regular route from Chicago and Milwaukee to the Twin Cities area was necessary in providing him with a profitable back-haul in his service to Chicago and Milwaukee, and, under a liberal construction of the Act should have been authorized by the Commission without the restriction imposed. A contract carrier is entitled to a profitable back-haul as is a common carrier, and to deny him that right violates

the national transportation policy of "providing for fair and impartial regulation of all modes of transportation" and for "preserving the inherent advantage of each," and is an unwarranted discrimination in favor of the common carrier. The lower Court held, as to the rights of contract carriers versus common carriers: "There should be no discrimination between carriers" (R. 344).

In *U. S. v. Carolina Freight Carriers Corp.*, supra, where a similar issue of profitless back-haul was involved, this Court held:

> "To appellee such matters involve life and death. Empty or partially loaded trucks on return trips may well drive the enterprise to the wall. A restriction in this case of the commodities which may be carried from any point in southbound trips is a patent denial to appellee of that 'substantial parity' between future operations and prior bona fide operations which the Act contemplates. Its *prior opportunity* should not be restricted beyond the clear requirement of the statute. For this Act should be liberally construed to preserve the position which those like appellee have struggled to obtain in our national transportation system." (Italics ours.)

Section 210 of the Act provides that "for good cause shown" the Commission may issue both a permit and certificate if it finds that both may be held consistent with the public interest and with the policy declared in Section 202 (a) of this part. The "consistency" referred to is not consistency with the interests of competing common carriers but consistency with the *public* interest. In other words, it is a consistency that is advantageous or of benefit to the public.

In the case of *Scott Bros. Inc. Collection and Delivery Service*, MC 2744; 1 Fed. Carrier Cases (7089) 70, 73, the Commission itself held:

> "In determining the question of consistency with the public interest, it is essential that we form some conception of the meaning of that phrase as used in the statute. The phrase is used in several places in the act. In Section 213, it is used in contrast with the phrase 'promote the public interest'. It follows from this use that its true meaning is that of 'not contradictory or hostile to the public interest'. * * *
>
> With this conception of the meaning of the phrase, we are of the opinion that the proposed operations are not hostile to the public interest and that in point of fact by *rendering more flexible the rendition of the proposed service and affecting economies both in time and money*, the public will ultimately receive benefit from the rendition of them by this carrier." (Italics ours.)

SIXTH POINT.

The statute (Sec. 209 (a)) provides that there shall be included in the permit for the continuance of a "grandfather" operation any regular or seasonal service in which there was an interruption on July 1, 1935, over which the carrier had no control; and therefore appellant's service for Kraft-Phenix Cheese Company, now known as Kraft Cheese Company, under contract entered into prior to July 1, 1935, was improperly excluded from appellant's bona fide "grandfather" operation.

The Commission refused to consider the Kraft Cheese Company contract service part of appellant's bona fide "grandfather" operation, and, over the objections and ex-

ceptions of appellant, excluded all testimony with reference thereto, on the ground that actual transportation of the company's products did not commence until after July 1, 1935. The lower Court erred in affirming that refusal and exclusion (R. 344-345).

In appellant's case, there was on and prior to July 1, 1935, an actual and admittedly valid contract existing between the appellant and the shipper which contract was made in pursuance of appellant's general trucking business, both as a general contract carrier and as an irregular carrier of general commodities. The execution of that contract was in itself the initial *service* to the shipper, as it was negotiated only after considerations and settlements as to rates, necessary equipment and increased personnel to be furnished and territory to be covered. Appellant did add materially to his equipment and personnel, at great expense, for the purpose of carrying out the contract with the Kraft Cheese Company, and was obligated and stood ready at all times from the execution of the contract to transport the Kraft Cheese Company's products when and wherever directed by that company in and within his territorial area. The Kraft Cheese Company itself, not the appellant as carrier, undertook, after the execution of the contract, to make a new arrangement in its method of distribution which caused an interruption of *service* beyond the control of the appellant until after July 1, 1935 (R. 304-315). Under Sec. 209 (a) of the Act, such interruption of service in a "grandfather" operation, does not place that service outside the realm of the carrier's "grandfather" operation, but the service contracted for is to be included in that operation. The word "service" as used in that Sec-

tion is a broader term than mere "transportation", "hauling" or the like. It may well include the "assumption of a contractual obligation" and the "preparations" made by the carrier for the benefit of the shipper, to fulfill that obligation. The shipper, by that *service*, is relieved from further negotiations and the execution of a contract with someone else. This interpretation is supported by the decision in *U. S. v. Carolina Freight Carriers Corp.*, supra, where the Court held that the Act should be liberally construed and the carrier's prior opportunity should not be restricted beyond the clear requirements of the statute.

The Act itself, Sec. 203 (a) (19), by its very language, in defining the words "services" and "transportation" clearly supports that liberal construction of the word "service" as used in Sec. 209 (b) with reference to "grandfather" operations, and plainly indicates the intent of Congress that it shall be liberally construed. That Section provides:

> "The 'services' and 'transportation' to which this part applies include all vehicles operated by, for, or in the interest of any motor carrier irrespective of ownership or of contract, express or implied, together with all *facilities* and property operated or controlled by any such carriers and used in the transportation of passengers or property in interstate or foreign commerce or *in the performance of any service in connection therewith.*"

The word "interrupt" in its natural, reasonable, and popularly accepted use means not only "the stopping of something that has commenced". It means also "to hinder the performance of", or "to defer because of some contingency". For instance, a planned marriage may be interrupted for some time by the illness of one of the parties.

A planned building project may be interrupted pending favorable weather conditions. The word "interrupt" in any liberal construction of the Act, must be given its broad, reasonable and comprehensive meaning, and given that meaning, it is apparent that the delay in transportation under the *bona fide* contract with Kraft was an "interruption" of service over which the appellant had no control, and which, under Sec. 209 (a) of the Act, brings the Kraft operation within his bona fide "grandfather" operation.

We contend that, when a person, in the general trucking business, under "grandfather" operation, enfered into a bona fide contract to transport property for a shipper, that contract, and the contractual obligation he assumed thereunder, immediately became part and parcel of his "grandfather" operation.

It is significant to note that the language of Sec. 209 (a) is not "interruptions of *operations*" or of *transportation*, but "interruptions of *service*".

So also, the proviso of Sec. 209 (b), prohibits the Commission from attaching any terms to a permit that would restrict the rights of the carrier to add *contracts* or to add to his equipment and facilities. It would seem that, under a reasonable and natural interpretation of this proviso, and when read in connection with the definition of "service" in Sec. 203 (a) (19), any bona fide *contract* added prior to July 1, 1935, is a service that is part and parcel of the carrier's bona fide "grandfather" operation.

We maintain that appellant's case differs from those cases heretofore brought before this Court in which a mere potential or simulated service was held to be properly excluded from a bona fide "grandfather" operation.

In *Alton Railroad Co. v. United States*, 62 Sup. Ct., Rep. 432, the court held that "while the test of a 'bona fide operation' within a specified territory includes 'actual rather than potential or simulated *service*', it does not necessarily restrict future operation to the precise points or area to be served.'" (Italics ours.)

In *U. S. v. Maher*, 307 U. S. 148, there was no contract for a regular route service. The operation was held not to be identified with the carrier's bona fide "grandfather" operation as no regular route over which he sought transportation was in existence on June 1, 1935. Appellant, however, had a regular route and irregular routes when his contract with Kraft was made.

In *McDonald v. Thompson, et al.*, 305 U. S. 263, 266, the Commission denied the "grandfather" right of applicant to haul over Texas highways, not because there was no actual operation prior to July 1, 1935, but because the State of Texas had taken away the carrier's right to the proposed operations on the grounds that these operations subjected the highways to excessive burden and endangered and interfered with ordinary use by the public.

Gregg Cartage & Storage Co. v. United States, supra, involved a different issue than that presented in appellant's case. The Court merely decided in that case that "the bankruptcy of a motor carrier is an interruption of service within the control of the carrier."

While the Commission sets forth in its findings that appellant's operation for shippers other than Swift were performed in conjunction with the Swift operation (R. 16), it inconsistently contended before the lower Court that the Kraft contract was legitimately excluded from appellant's bona fide "grandfather" operation because the Kraft Com-

pany contract was not connected with the Swift contract, as Kraft is nationally known as a different business than Swift & Company, the Kraft Company being primarily a cheese manufacturer, and Swift & Company primarily a meat packer, and that cheese was merely an incidental product of Swift & Company. If that reasoning be sound, then canned foods should also have been classed merely incidental products of Swift & Company, and it should have been held with equal persuasion that appellant's contract with Libby, McNeil & Libby, included in the Commission's order as part of his bona fide operation, was also unauthorized.

So also, the Commission in its argument before the lower Court very ingeniously suggested that Appellant should not be disturbed about the exclusion of the Kraft contract from his bona fide "grandfather" operation because he could, if he wished, make application for an "extension" operation under Section 209 (b) seeking authority to serve the Kraft Cheese Company.

Pending the decision in this case, appellant filed an application with the Commission on January 31, 1941, for an extension of his operation to include the Kraft Cheese Company contract. While the Commission, on August 14, 1942, on said application, granted appellant authority to carry on his service under the Kraft contract, by determining that the operation of appellant "under individual contracts with persons who operate *cheese processing businesses* of dairy and similar food products and supplies" is lawful, we maintain that that operation for Kraft Cheese Company should have been included in appellant's "grandfather" authority. By not including it in that authority contrary to the provisions of the Act, appellant's "grandfather" rights have

been aborted, and his opportunity for further extensions materially jeopardized by reason of the well-known reluctance and delays by the Commission to grant further extensions and the strong opposition by competitors thereto.

Moreover, by again limiting appellant's operation in that respect to the special shippers or class of shippers the appellant may serve, namely, "cheese processing businesses", the same question is still at issue, in the Kraft operation, as to the power of the Commission, in specifying the business of the carrier and the scope thereof, to restrict him to certain shippers or class of shippers and to define the business of the shipper by the narrow bounds of only a major product he deals in, or by some special branch of his business.

SEVENTH POINT.

The denial to appellant of a fair hearing by the Commission and the irreparable injury that will result to appellant from the enforcement of the Commission's restrictive order deprives him of his property without due process of law and is repugnant to and in conflict with the Fifth Amendment to the Constitution of the United States and the Statute.

The Commission based its findings and order upon its decision in the Keystone case, supra, stating that the same problem, with respect to defining the business of appellant and scope thereof, is here presented, and that therefore, in granting authority in appellant's case, it adopts the general form of authority used in the Keystone case (R. 22).

The lower Court found that the Commission report and order of May 13, 1941, in issue here, were made after a full hearing. This was error in the face of the fact that the

Keystone case, supra, was not *res judicata* and plaintiff was not a party thereto and had no notice thereof, and that the interpretation of the Act and the policy enunciated in that case were not the interpretation and the policy in force when appellant's application was filed and hearing had thereon. The Commission arbitrarily, prejudicially and unjustly refused to grant appellant's petition for oral argument, filing briefs, reconsideration and review of both the Recommended Order of December 5, 1939, and its final subsequent and far more restrictive Findings and Order of May 13, 1941—all of which deprived appellant of his property rights and his legal rights under the Motor Carrier Act (R. 3, 4, 24 and 25).

We maintain that these denials by the Commission do not constitute a fair hearing within the meaning of the due process clause of the Constitution. The "grandfather" right is in the nature of a Congressional franchise. It is a limited property right. At the time of the hearing in September, 1938, the Commission's Keystone case, supra, was not a part of the law of the case but it was subsequently made a part of the denial order of May 13, 1941, and in fact that order based upon it, although no record of facts had been made and that case has never been adjudicated by the entire Commission itself.

Counsel had no opportunity of showing by argument or brief why they believed Division 5's Keystone decision was both erroneous as a matter of law and was not applicable to the facts in the instant case. Such refusal does not conform to the judicial standards of a fair hearing required by the due process clause of the Constitution. Full and fair hearing has not been accorded this appellant. The

argument prior to the proposed or Recommended Order of the Trial Examiner did not follow, nor could have considered, the doctrine of the Keystone case as applicable to the facts and evidence. The Keystone decision had not then been rendered. It is further obvious, had the Keystone doctrine been *known to the* counsel at the time of hearing before the Trial Examiner in September, 1938, or had the Commission afforded appellant an opportunity for argument or rehearing, Counsel would not have had to resort to necessity of offering in evidence at the hearing before the lower Court the Articles of Incorporation of Swift & Company showing that it is more than a packing house, and is in fact a *food* concern.

There is nothing in appellant's application, or in the record, to indicate that either the appellant or the shipper were ever given notice or opportunity to show the scope, extent, range or sweep of the shipper's business, and the Commission made no findings upon which it could base a classification of the shipper, and particularly such arbitrary and restrictive classification of the business of the shipper as was made in appellant's case.

Th. Interstate Commerce Act, Part II, provides, Sec. 205 (b): "All the provisions of Section 17, of Part I shall apply to all proceedings under this part," and said Section 17, Sub. (6) provides for such rehearing. Even though the Commission may have discretion under said Sec. 17, Sub. (6) of the Act to "reconsider the matter" either upon the same record or after a further hearing, the denial of such further hearing under the circumstances here set forth constitutes a violation and abuse of that discretion which we think does not conform to the judicial standards of a fair

hearing. The issue here presented is one of "general transportation importance" within the meaning of Part I, Sec. 17, Sec. (b), of the Act. That Act indicates that the Commission's rules should be formed so that there shall be no arbitrary, capricious and unjust denial, especially without even an explanation, of appellant's petition for reconsideration or review, and that appellant be afforded either the opportunity of presenting oral argument or of submitting a complete and comprehensive brief on this vital phase of "general transportation importance". The case at bar falls within the doctrine of the case of *Morgan v. U. S.*, 56 S. Ct. 907 (May 25, 1936), declared by Justice Hughes (p. 911), to-wit: "The 'hearing' is the hearing of evidence and argument."

This Court, in the *Morgan Case*, set forth, in effect, that those who are brought into contest with the government in a quasi judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the government proposes, and to be heard upon its proposals before it issues its final command. The Court further said relative to such hearing (p. 777, 32 L. Ed.):

> "Congress, in requiring a 'full hearing', had regard to judicial standards—not in any technical sense but with respect to these fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature. If in an equity cause, a special master of the trial judge permitted the appellant's attorney to formulate the findings upon the evidence, conferred ex parte with the appellant's attorney regarding them, and then adopted his proposals without affording an opportunity to his opponent to know their contents and present objections, there would be no hesitation in setting aside the report or

decree as having been made without a fair hearing. *The requirements of fairness are not exhausted in the taking or consideration of evidence, but extended to the concluding parts of the procedure as well as to the beginning and intermediate steps.*" (Italics ours.)

The hearing in the instant case is a close parallel to that afforded appellant in the *Morgan Case,* and as the Court there found the hearing fatally defective and the order of the Secretary invalid, so here the Order of Division 5 was and is likewise fatally defective and invalid.

The lower Court erred in its finding that the appellant has not been injured by the interpretation of the Commission for the reason he may continue operation under his Swift and Libby contracts and may add other contracts for the transportation of similar property for food canners and meat packers in the territorial area covered by him in the crucial date (R. 343).

As packing houses and food canneries are comparatively scarce in appellant's territorial area, and are usually large corporations who use only a very limited contract carrier service, the appellant, under the Interstate Commerce Order, is really at the mercy of these big corporations. Swift and Company are practically the only packing house that uses contract carrier service to any extent between the Twin Cities area and Chicago, and by limiting appellant's operation in that respect to service for packing houses, it practically deprives him of his statutory right to substitute or add contracts within the scope of his permit. With meat rationing in effect, appellant's business has already dropped approximately 50% and the Commission's restrictions will ultimately put him out of business. If Swift & Com-

pany should decide to establish its own Sales Organization —a separate entity or a separate distributing company—appellant would have no authority whatsoever to transport products for them. The same would apply to food canneries.

It is readily apparent therefore that the restrictions, as to commodities, territory and shippers, imposed upon appellant by the Commission will cause him irreparable injury, will pulverize his bona fide "grandfather" operation and will practically destroy it; and that the denial to appellant of a fair hearing in the matter is in violation of the Fifth Amendment to the Constitution of the United States which provides that "no person shall * * * be deprived of * * * property without due process of law."

Moreover, such restrictions of a carrier in his "grandfather" operation, and a denial of a fair hearing thereon contravene the declared policy of the Motor Carrier Act, and practically abrogate the rights of those carriers, such as appellant, who have at large expense and through initiative, enterprise and hard work, attained a position in the competitive transportation system, and which position Congress sought earnestly to preserve through the "grandfather" clause of the Act.

Surely, the Commission's interpretation of the applicable provisions invoked in appellant's case, is entirely contrary to the liberal interpretation this Court, in the *U. S. v. Carolina Freight Carriers Corp.* case, supra, has held should be given to the Act.

CONCLUSION.

The Order and Decree of the lower Court should be reversed and the Order of the Interstate Commerce Commission annulled and set aside, and the Commission directed to amend and liberalize its findings and to issue to appellant authority and a permit in conformity to the evidence and proper interpretation of the law in this case.

Respectfully submitted,

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